No. SC93345

In the Missouri Supreme Court

STATE OF MISSOURI EX REL.
SHARON EDMONDS,

Relator,

v.

THE HONORABLE SANDY MARTINEZ,

Respondent.

Appeal from Washington County Circuit Court
Twenty-Fourth Judicial Circuit, Division One
The Honorable Sandy Martinez, Judge

RESPONDENT'S BRIEF

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STATEMENT OF FACTS

Relator ("Defendant") pleaded guilty to manufacturing a controlled substance in one cause number; possession of a controlled substance in a second cause number; and manufacturing a controlled substance in a third cause number. Relator's Appendix ("Appendix") at A7, A17, A26. On September 4, 2003, Defendant received a suspended imposition of sentence and was placed on supervised probation for five years. Appendix at A7.

On July 21, 2008, Defendant's probation was suspended for non-payment of court costs and a probation violation hearing was scheduled for September 4, 2008. Appendix at A8.

At this hearing, and at intervals ranging from one to three months subsequently, the Court "in an effort to work with Ms. Edmonds, instead of revoking her probation and sending her to prison for not complying with conditions of probation, …worked with Ms. Edmonds and allowed her to make payments towards the [court costs.]." Appendix at A44.[1]

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[1] Defendant claims, without any citation to the record, that she is disabled, that her only means of income is her social security disability check, and that her outstanding court costs stem from "medical treatment" while in custody. Respondent does observe a reference to May 10, 2012 correspondence from St.

On January 7, 2013, Defendant filed a "Motion to Dismiss for Lack of Jurisdiction or, In the Alternative, Motion to Discharge from Probation" with the Circuit Court of Washington County. Appendix at A34-A39. On February 4, 2013, the Court denied the motion during transcribed proceedings. Appendix at A40-A46. During the proceedings of that date, defense counsel admitted that the court suspended probation prior to termination of Defendant's probation. Appendix at A43-A44.

The Court held that:

> . . . by making Ms. Edmonds appear in court every month, the Court had an affirmative manifestation of its intent to conduct a revocation hearing if she did not pay the court costs as ordered to do so.
>
> The only reason the Court allowed this to continue was to grant Ms. Edmonds some time to pay this court cost. Ms. Edmonds did not object to the Court's extension of the probationary period because it actually benefitted her, asking the Court not to revoke her probation and instead give her a chance. The Court made it very clear to Ms. Edmonds . . . every month that she appeared in court that if she did not pay her court costs

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Anthony's Hyland Behavioral Health regarding Defendant, and notes that the underlying charges relate to substance abuse. Appendix at A32.

the Court actually had affirmative manifestation to revoke her probation and send her to the Department of Corrections.

Appendix at A44-45. *See*, § 559.036.8, RSMo (Cum. Supp. 2012) (requiring affirmative manifestation of intent to revoke plus notice prior to expiration of probation and reasonable efforts to hold hearing within statutory period).

The Court distinguished Defendant's cases, observing that "the Court has continuously ordered Ms. Edmonds to appear in court, has continuously monitored the case and has continuously actually set it … for a case review or revocation hearing every month for the Court to review her payments, thus showing affirmative manifestation of the Court's intent to timely conduct a revocation hearing." Appendix at A45.

The Court further held that Defendant had appeared in court and had never objected "to the Court continuing her probation and never asked the Court to conduct a hearing and make a decision" until her motion of January 9, 2013. Appendix at A45-46. The Court therefore denied the motion but set a hearing on revocation for March 4, 2013. Appendix at A46.

On February 19, 2013, the Missouri Court of Appeals, Eastern District, entered its Preliminary Order in Prohibition. On April 1, 2013, the State filed Suggestions in Opposition and an Answer. On April 3, 2013, the Court of Appeals quashed its Preliminary Order and denied the Petition. Appendix at A48.

On April 26, 2013, Defendant filed her Petition for Writ of Prohibition, or in the Alternative, for a Writ of Mandamus with this Court. On May 6, 2013, this Court issued its Preliminary Writ in Prohibition. On June 5, 2013, Respondent filed an Answer/Return and Suggestions in Opposition.

ARGUMENT

The trial court has personal and subject matter jurisdiction over this pending criminal case where imposition of sentence has been suspended. Defendant did not raise or plead a due process or other constitutional violation at her first opportunity, but even if she had, Defendant has not been deprived of due process where she was provided with notice and multiple opportunities for a probation violation hearing, but chose not to exercise her right to a hearing until now because she desired to avoid being sent to prison. The trial court has statutory authority where Defendant was given notice of a probation violation within the statutory period and a hearing was set within the statutory period, but Defendant did not desire a hearing within the statutory period by her own admission. Finally, the doctrine of laches bars Defendant's claim.

A. Introductory synopsis

This is a case in which the prosecutor moved to revoke probation within the probationary period, Relator ("Defendant") was served notice within the probationary period, the hearing was scheduled within the probationary period, but the hearing was not held within the probationary period because Defendant did not want a hearing that, by her own admission, "would likely result in her facing a felony conviction and a prison sentence…" Relator's Brief at 9-10.

Defendant was, and remains, under a suspended imposition of sentence with a pending case. Defendant's procedural and substantive due process rights have been protected, as the statutory scheme is designed to do, through notice and an **opportunity** for a hearing, but Defendant seeks to pervert the Court's willingness to allow her to improve her position on her obligation to pay court costs prior to a hearing which could result in sentencing (or the avoidance of sentencing and conviction) into a permanent windfall unintended by the legislature.

Defendant would have this Court hold, as a matter of law, that the expiration of probation requires her discharge without conviction whether she complied with its conditions or not, despite repeal by the legislature of the statute that formerly provided for automatic discharge upon expiration of probation. The legislature has now expressly provided that a suspended imposition of sentence may be continued without probation (making it clear that probation expiration does not eliminate the authority to sentence as it once did). Because the suspended imposition of sentence makes this a pending case, the circuit court has the authority to hold case reviews with or without probation prior to imposing sentence or declining to impose sentence.

Far from being a victim of unreasonable delay and prejudice, Defendant has received a windfall period of liberty and the opportunity to avoid a felony conviction and sentencing, as she desired, and Defendant may not complain of

unreasonable delay or prejudice under either governing case law or the policy behind the statutory scheme.

B. Writ Standards

This Court has jurisdiction to issue original remedial writs under article V, section 4 of the Missouri Constitution. *State ex rel. Valentine v. Orr*, 366 S.W.3d 534, 538 (Mo. banc 2012). "Prohibition is an original remedial writ brought to confine a lower court to the proper exercise of its jurisdiction." *State ex rel. Ashby Road Partners, LLC v. State Tax Com'n*, 297 S.W.3d 80, 83 (Mo. banc 2009) (quoting *State ex rel. White Family P'ship v. Roldan*, 271 S.W.3d 569, 572 (Mo. banc 2008)). A writ of prohibition will issue to prevent an abuse of judicial discretion, to avoid irreparable harm to a party, or to prevent an abuse of extra-jurisdictional power. *Id.* A writ of prohibition is discretionary, however, and "there is no right to have the writ issued." *Id.* (quoting *State ex rel. Linthicum v. Calvin*, 57 S.W.3d 855, 857 (Mo. banc 2001)).

"In a prohibition proceeding the burden is on the petitioning party to show that the trial court exceeded its jurisdiction, and that burden includes overcoming the presumption of right action in favor of the trial court's ruling." *State ex rel. Breedlove v. Seay*, 244 S.W.3d 791 (Mo. App. S.D. 2008) (quoting *State ex rel. Dixon v. Darnold*, 939 S.W.2d 66, 69 (Mo. App. S.D. 1997)).

To be entitled to a writ of mandamus, a litigant must allege and prove that she has a clear, unequivocal, specific right to a thing claimed. *United*

States Department of Veterans Affairs v. Boresi, 396 S.W.3d 356 (Mo. banc 2013). This Court reviews the denial of a writ of mandamus for an abuse of discretion. *Id*; *Valentine*, 366 S.W.3d at 538. "Ordinarily, mandamus is the proper remedy to compel the discharge of ministerial functions, but not to control the exercise of discretionary powers." *State ex rel. Mertens v. Brown*, 198 S.W.3d 616, 618 (Mo. banc 2006). However, if the respondent's actions are wrong as a matter of law, then she has abused any discretion she may have had and mandamus is appropriate. *Valentine*, 366 S.W.3d at 538.

C. Constitutional Claim Waived, then Abandoned

Defendant raised no constitutional claim in the Court of Appeals, nor in the Petition for Writ before this Court. Failure to raise a constitutional claim at the first opportunity waives the claim. *State v. Wilder*, 946 S.W.2d 760, 761 (Mo. App. E.D. 1997). While Defendant belatedly inserts due process language into her Point Relied On in her brief, she abandons any such claim by failing to cite any authority or carry the issue forward in any of her four sections of Argument. A claim of error not carried forward into the argument portion of the brief is deemed abandoned. *State v. Gott*, 784 S.W.2d 344, 345 (Mo. App. S.D. 1990). Failure to cite relevant authority or explain why none is available preserves nothing for review, and this Court is entitled to consider the point abandoned. *Bell v. State*, 996 S.W.2d 739, 743 (Mo. App. S.D. 1999).

The necessity for notice and an opportunity for a hearing prior to a probation revocation under the Due Process Clause was established by the United States Supreme Court in *Gagnon v. Scarpelli*, 411 U.S. 778 (1973), a case in which sentence had previously been imposed.[2] Here, no sentences have yet been imposed and, as discussed below, the cases are still pending.[3] In her four sections of "Argument," Defendant does not challenge the anticipated deprivation of a limited liberty interest in probation without due process, but merely the power of the Court (i.e., its "jurisdiction" and statutory authority) to revoke probation and impose a sentence. *See*, *State ex rel. Carlton v. Haynes*, 552 S.W.2d 710, 718 (Mo. banc 1977) (Shangler, Sp. J., concurring in result)

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[2] The statute providing for notice and an opportunity for hearing for probation revocations was passed in the wake of the *Gagnon* decision, to protect due process rights. Prior to that decision, Missouri did not require hearings for probation revocations. *See*, *State ex rel. Carlton v. Haynes*, 552 S.W.2d at 713-715.

[3] Defendant does not contest that she had notice of the violation or an opportunity to be heard, and she has counsel for the hearing the trial court has set which she seeks to prohibit by writ; hence, there is no procedural due process issue. Nor does she expressly claim a violation of substantive due process through arbitrary or capricious conduct by the trial court.

(declining to apply constitutional analysis to writ case involving probation revocation because petitioner did not seek discharge on constitutional grounds).

Thus, there is no constitutional due process issue before the Court; any such claim has been both waived and abandoned.

D. Circuit Court has "jurisdiction"

The circuit courts have jurisdiction over all cases and matters, civil and criminal. Mo. Const. art. V, sec. 14 (1945); *J.C.W. ex rel. Webb v. Wyciskalla*, 275 S.W.3d 249, 253 (Mo. banc 2009). The circuit court also has the power to render a judgment that binds the parties, where Defendant is a resident of Missouri, and therefore has personal jurisdiction. *J.C.W.*, 275 S.W.3d at 254.[4] As these are the only two forms of "jurisdiction" in Missouri, Defendant's claim that the trial court lacks "jurisdiction" should be rejected. *See*, *id*.

E. Probation is a creature of statute whose contours are defined by the legislature.

The power of a judge to grant probation is dependent upon statutory authorization. *State ex rel. McCulloch v. Schiff*, 852 S.W.2d 392, 395 (Mo. App.

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[4] Defendant does not contest that she was properly haled before the circuit court by an appropriate charging document or that she was served with the notice of violation and notices of hearing pertaining to the probation violation alleged. *See*, *Carlton*, 552 S.W.2d at 714.

E.D. 1993). In the absence of legislative authorization, "a court may no more refuse to punish one found guilty of a crime than it can punish one for conduct not legislatively defined as criminal. …It is a legislative prerogative to create the power of judicial clemency in the form of probation or to deny such power…" *Id.* at 395 (quoting *State ex rel. Hughes v. Kramer*, 702 S.W.2d 517, 519-520 (Mo. App. E.D. 1985)). This Court is required to determine the General Assembly's intent and give effect to that intent. *Andrews v. State*, 282 S.W.3d 372, 377 (Mo. App. W.D. 2009); *Cline v. Teasdale*, 142 S.W.3d 215, 222 (Mo. App. W.D. 2004).

F. The trial court has statutory authority to hold a hearing where a probation violation occurred within the probationary period, the Court manifested intent to revoke within the probationary period, Defendant was served with notice within the probationary period, a hearing was set within the probationary period, probation was suspended within the probationary period, and Defendant concedes delays in holding the hearing were desired by Defendant to avoid a felony conviction and prison sentence.

Defendant contends the circuit court lacks authority under § 559.036.8, RSMo (Cum. Supp. 2012) to revoke probation after expiration because that authority extends only "for any further period which is reasonably necessary for the adjudication of matters arising before its expiration, provided that some

affirmative manifestation of an intent to conduct a revocation hearing occurs prior to the expiration of the period and that every reasonable effort is made to notify the probationer and to conduct the hearing prior to the expiration of the period." *Id*.

Defendant admits that she was placed on supervised probation on September 4, 2003, that the court suspended her probation for non-payment of court costs on July 21, 2008, and that the court scheduled a probation violation hearing for September 4, 2008, all within the probationary period. Relator's Brief at 4-5; Appendix at A7-A8, A27. Defendant appeared with counsel on that date, was ordered to pay $55 per month towards her court costs, and according to the docket sheets, the hearing was "Continued/Rescheduled." Appendix at A8.

Thus, there was an affirmative manifestation to revoke probation within the probationary period, notice within the probationary period, and an **opportunity** for a hearing within the probationary period. *Cline v. Teasdale*, 142 S.W.3d at 223 (notice of violation sufficient affirmative manifestation but requires reasonable time to prepare defense); *State ex rel. Cline v. Wall*, 37 S.W.3d at 882 (setting hearings after filing of violation notices is affirmative manifestation of intent); *State ex rel. Connett v. Dickerson*, 833 S.W.2d at 474 (hearing set after violation reports and notice to realtors sufficient affirmative manifestation of intent to revoke).

However, Defendant had not complied with her obligation to pay court costs and, while represented by counsel, chose not to go forward that day with a hearing on the probation violation issue because, as she candidly confesses, she desired to avoid a finding of a violation which would likely result in felony convictions and a prison sentence. Relator's Brief at 9-10. Under such circumstances, Defendant cannot be heard in equity to complain of either unreasonable delay or prejudice.[5] Defendant is not in custody, as in a case in which a capias warrant is issued, and her due process rights have been protected (the purpose of the statute) through notice and an **opportunity** to be heard.[6]

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[5] In her Argument denominated "IV," Defendant states that "[n]o objections were ever lodged by the State or Respondent to any continuances" and that Respondent (Judge Martinez) "granted every continuance[,]" suggesting by process of elimination that the moving party for the repeated continuances was Defendant. Relator's Brief at 15.

[6] Defendant candidly admits this is not a case in which Defendant desired an earlier hearing, which the Court delayed either *sua sponte* or at the request of the prosecutor. Nor is it a case in which Defendant was in custody at the time of the delays, or was otherwise prejudiced. Defendant never desired a hearing and wishes to avoid one now.

G. Defendant fails to meet her *Carlton/Petree* burden to show unreasonable delay plus prejudice. Defendant was not ready and willing to proceed with a revocation hearing earlier and Defendant admits she preferred not to have such a hearing because it would likely send her to prison.

The petition should be dismissed and the preliminary order vacated because the Circuit Court affirmatively manifested an intent to revoke probation and gave Defendant notice prior to the expiration of the statutory period, and Defendant fails to meet her burden to show that any delays in her probation revocation hearing were unreasonable and that she was ready and willing to proceed at an earlier date. *State ex rel. Carlton v. Haynes*, 552 S.W.2d 710, 714-715 (Mo. banc 1977); *Petree v. State*, 190 S.W.3d 641 (Mo. App. W.D. 2006). *See*, § 559.036.8, RSMo (Cum. Supp. 2012).

In *Carlton*, this Court held that the circuit court did not lose jurisdiction over the person of the defendant after the expiration of probation unless the resulting delay was "unreasonable and prejudicial to the [defendant]." *Carlton*, 552 S.W.2d at 714. Moreover, the defendant was not entitled to relief by reason of any delay in holding the final probation revocation hearing "unless he was prejudiced thereby. And the burden is upon him to make such a showing." *Id.* (quoting *Ewing v. Wyrick*, 535 S.W.2d 443, 445 (Mo. banc 1976)).

In *Carlton*, this Court found neither unreasonable delay nor prejudice where an arrest warrant was issued prior to expiration of probation, the warrant was executed prior to expiration, and the hearing was initially scheduled before the expiration of probation but was continued due to the defendant's hospitalization. *Carlton*, 552 S.W.2d at 714. This was despite a statute at the time that provided for automatic and absolute discharge upon the expiration of probation (since repealed). *Id*. *See also*, *State ex rel. Cline v. Wall*, 37 S.W.3d 877, 880-882 (Mo. App. S.D. 2001) (collecting cases and citing *Carlton*).

In *Petree*, the Court of Appeals held that, where a probation revocation hearing was noticed up prior to the expiration of probation but not conducted until after the expiration, the burden was on the defendant to show unreasonable delay and that defendant was ready and willing to proceed at an earlier date. *Id.*, 190 S.W.3d at 643. In *Petree*, the defendant failed to allege or demonstrate such readiness and therefore failed to meet his burden. *Id.*

As in *Petree*, there is no indication that Defendant was prepared to proceed. Defendant candidly admits that she did not desire the continuances of the hearing because it "would likely result in her facing a felony conviction and a prison sentence…" Relator's Brief at 9-10.

Where Defendant not only acquiesced, but affirmatively desired continuances of the probation violation hearing so that she could continue to attempt to comply with the conditions of probation, she cannot be heard to

complain in equity that the Court allowed her to avoid prison. *See*, *State ex. rel. McKee v. Riley*, 240 S.W.3d 720, 726-727 (Mo. banc 2007) (statutory right to speedy trial requires court to set case for trial "as soon as reasonably possible" after "defendant announces that he is ready for trial and files a request for speedy trial"); § 545.780(1), RSMo (2000).

H. Expiration of probation does not limit Court's statutory authority to impose sentence in an SIS case because SIS without probation is an "authorized disposition" provided for by the legislature and does not preclude subsequent sentencing in what remains a "pending" case.

The case law cited by Defendant interpreting § 559.036.8, RSMo (Cum. Supp. 2012) and its predecessor[7] is inapposite because, with one exception in which this issue was not raised, it deals with probation tied to suspended executions of sentences, rather than pending cases in which sentence has yet to

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[7] This statute was formerly § 559.036.6 prior to 2012 amendments, but the wording of the relevant paragraph did not change. Thus, the Court need not reach whether § 559.036.6, RSMo (Cum. Supp. 2009) applies because it was in effect when probation allegedly expired on December 4, 2008 or whether § 559.036.8, RSMo (Cum. Supp. 2012) applies because that version was in effect at the time the trial court allegedly exceeded its statutory authority by setting the hearing Defendant seeks to prohibit.

be imposed such as this one. Rather, this case is more analogous to *State ex rel. Connett v. Dickerson*, 833 S.W.2d 471 (Mo. App. S.D. 1992), which involved a suspended imposition of sentence followed by a probation revocation hearing in which no sentence was imposed. *Id.* at 472-473. In *Connett*, the trial court found in the face of a confusing record that since no sentence was imposed, "that the SIS had to have continued[.]" *Id.* at 473. There, as here, the court affirmatively manifested an intent to conduct a revocation hearing and the relator was notified within the five-year period. *Id.* at 474. "When that hearing was continued at relator's request, he cannot complain that it was not conducted prior to the expiration of the five-year period." *Id.*

The Court further held in *Connett* that if imposition of sentence was previously suspended, the trial court may revoke probation and impose any sentence available under Section 557.011, including a suspended imposition of sentence "with or without placing the person on probation[.]" *Id.* at 475 (citing § 559.036.3). The Court held that, "[i]n effect, the action of the trial court was to modify or enlarge the conditions of probation as authorized by § 559.036.3." *Id.* The Court found its preliminary order was improvidently issued and ordered it quashed and the petition dismissed. *Id.*

Suspension of imposition of sentence is a hybrid in the law. *State ex rel. Peach v. Tillman*, 615 S.W.2d 514, 517 (Mo. App. E.D. 1981). It is a suspension of active proceedings in a criminal prosecution; it is not a final judgment. *Id.*

Suspension of imposition of sentence is a matter of "grace, favor and forebearance." *Id.* (quoting *Pagano v. Bechly*, 232 NW 798, 800 (1930)). When the recipient of a suspended imposition of sentence has complied with the terms of her probation the court may discharge her from the jurisdiction of the court so that a judgment of conviction may not thereafter be entered upon the verdict in that case. *Id.* at 518.

A case in which there is a suspended imposition of sentence is still "pending" because a final determination of sentence has not been made which disposes of the case. *Barnes v. State*, 826 S.W.2d 74, 75-76 (Mo. App. E.D. 1992). An SIS is not a "judgment." *Id.* at 76. Probation is not part of the sentence, nor is it a sentence itself. *Id.* at 76. In effect, probation operates independently of the criminal sentence. *Id.* "An action or a suit is 'pending' from its inception until the rendition of final judgment." *Id.* (quoting BLACK'S LAW DICTIONARY 1134 (6TH Ed. 1990)).

In this respect, a suspended imposition of sentence is in stark contrast to a suspended execution of sentence, in which a judgment of execution is entered and there is no prosecution "pending." *Id.* at 76. "Suspension of sentence is a suspension of active proceedings in a criminal prosecution. It is not a final judgment, or the equivalent of a nolle prosequi or discontinuance, nor does it operate as a discharge of accused." *State v. Lynch*, 679 S.W.2d 858, 860 (Mo. banc 1984) (rev'd on other grounds) (quoting 24 CJS § 1571(1)(a) (1961)).

Section 559.036.3, RSMo (Cum. Supp. 2012) states in relevant part, "if imposition of sentence was suspended, the court may revoke probation and impose any sentence available under § 557.011, RSMo." Among the authorized dispositions is § 557.011.2(3), RSMo (Cum. Supp. 2012) which authorizes the court to "[s]uspend the imposition of sentence, with or without placing the person on probation…"

Because the legislature has expressly authorized the trial court to suspend an imposition of sentence without tying it to a term of probation, Defendant's contention that the expiration of probation automatically discharges her from the imposition of sentence is mistaken. The legislative intent in this respect is made even clearer by the repeal of former § 549.111, RSMo (1969) which did at one time provide for automatic discharge but was subsequently repealed. *See*, *State ex rel Connett v. Dickerson*, 833 S.W.3d 471, 475 (Mo. App. S.D. 1992) (one of the options under § 559.036.3 for disposition under § 557.011 was suspended imposition of sentence with or without placing the person on probation).

Even if this Court accepts, *arguendo*, that probation has expired by operation of law, the plea court still has jurisdiction over this "pending" case to impose sentence (following a hearing) where Defendant failed to comply with the conditions of probation, neither the Court nor the prosecutor has discharged Defendant from the underlying charge, and the law no longer provides for automatic discharge by operation of law upon the expiration of probation as it

once did. Indeed, the legislative repeal of that provision, combined with the authorized disposition of suspended imposition of sentence without probation, makes it plain that under the governing legislative framework, the length of probation does not define or limit the Court's "jurisdiction" to impose sentence.

"In effect," *see*, *Connett*, *supra*, the trial court continued the SIS without probation, an authorized disposition under § 557.011.2(3), RSMo (Cum. Supp. 2012), for the benefit of Defendant in order to allow her to put herself in a more favorable posture prior to any sentencing or to avoid sentencing (and resultant conviction). This is consistent with the policy behind the legislative scheme, and not inconsistent with protecting her due process rights to notice and an **opportunity** for a hearing (which Defendant's pleading makes plain she consciously declined to avoid prison).

Defendant's authority is inapposite or mistaken. In *Stelljes v. State*, 72 S.W.3d 196 (Mo. App. W.D. 2002), the Court held that issuance of capias warrants and suspension of probation prior to the expiration date constituted affirmative manifestations of intent to conduct a probation revocation hearing, and found a delay of several years in conducting a hearing caused by Defendant's incarceration in an out-of-state prison reasonable. This supports the State's position here that suspension of probation within the probationary period constituted an affirmative manifestation of intent to conduct a probation

revocation hearing, and that Defendant's conduct informs the analysis of what delays are reasonable, even when the hearing is conducted years later.

State ex rel. Breedlove v. Seay, 244 S.W.3d 791 (Mo. App. S.D. 2008), is inapposite. In that case, restitution payments (the grounds for the affirmative manifestation of intent prior to expiration of probation) had been made prior to the expiration of probation and a hearing had resolved that issue. *Id*. at 795. The problem resulting in the writ was a notice of a new violation that took place after probation had expired. *Id*. at 796. Here, it is uncontested that the notice of violation for which the hearing is to be conducted took place within the statutory period. Defendant is correct, however, in asserting that *Breedlove* cites *Petree* with approval. *Id*. at 796 n.4. This is all the more reason for the Court to follow *Petree*, which undeniably supports Respondent.

State ex rel. Whittenhall v. Conklin, 294 S.W.3d 106 (Mo. App. S.D. 2009), involved a suspended execution of sentence where Defendant did not request any continuances until 14 months after the expiration of probation and the hearing was not held until 3 years after expiration. In the case at bar, Defendant confesses she desired the delays to allow her to avoid a felony conviction and prison sentence. Relator's Brief at 9-10. Moreover, the Court has

not lost the authority to sentence in the instant case, which involves a suspended imposition of sentence.[8]

State v. Roark, 877 S.W.2d 678 (Mo. App. S.D. 1994), upheld a probation revocation hearing conducted after probation had expired where the state had neglected to subpoena witnesses in a case scheduled for hearing prior to expiration. After the hearing was reset, the defendant sought a one-week continuance. Here, the affirmative manifestations of intent occurred prior to expiration and Defendant admits she desired several years of delay to avoid a finding of a violation that would result in a felony conviction and prison sentence. *Roark* therefore supports the Respondent.

Cline v. Teasdale, 142 S.W.3d 215 (Mo. App. W.D. 2004), is also no help to Defendant. In *Cline*, the Court held that an affirmative manifestation of intent to hold a revocation hearing on a different violation was sufficient where the defendant also received informal notice of the violation that was ultimately found in a post-expiration hearing prior to expiration, although formal notice did not come until after expiration.

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[8] The Court also observed in *Whittenhall* that the statutory amendment providing that probation shall remain suspended until the Court rules on a motion to revoke probation had not yet taken effect. *Id.* at 110 n.7. *See*, § 559.036.7, RSMo (Cum. Supp. 2012).

State ex rel. Brown v. Combs, 994 S.W.2d 69 (Mo. App. W.D. 1999), is inapposite because it turned on an attempt to impose a statutorily-prohibited third term of probation after an SIS with probation was revoked, and a subsequent SES with probation was revoked. *Id.* at 71-72. The Court held that the sentencing court had lost jurisdiction to resentence upon remand due to the failure to impose the previously-designated sentence for more than a year after the expiration of probation. *Id.* at 73. However, that was not a case where sentence had yet to be imposed and the case was therefore pending, and not final, as here.

Williams v. State, 927 S.W.2d 903 (Mo. App. S.D. 1996), cited by Defendant, supports Respondent. In *Williams*, the Court held that revocation of the defendant's probation almost two years after expiration of the probationary period was not untimely where the judge manifested intent prior to the expiration of probation by issuing a capias warrant, and the defendant's own actions in absconding prevented the court from holding a timely hearing. *Id.* at 905-907. Similarly, in the case at bar the affirmative manifestations took place within the probationary period, and Defendant's own actions supporting her desire to delay or avoid a felony conviction and prison sentence were responsible for the delays in the hearing she was given an opportunity for on many earlier occasions.

Wesbecher v. State, 863 S.W.2d 2 (Mo. App. E.D. 1993), was distinguished in *Williams*, and is distinguishable here, because no revocation proceedings were commenced prior to the expiration of probation.

Thus, the preliminary writ preventing the plea court from acting on this "pending" case should be vacated and the Petition dismissed. Because probation is not part of the sentence but operates independently, the plea court remains free to impose any authorized disposition under § 557.011 in this pending case from which Defendant has not been discharged by the prosecutor, the Court, or by operation of law.[9] *See*, *Connett*, 833 S.W.2d at 475.

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[9] Defendant contends that recent legislation constrains the trial court's sentencing options, but that is not relevant to her claim that the court lacks jurisdiction or statutory authority altogether. Furthermore, the statute cited by Defendant has been further amended in 2013. The court will apply the relevant statute at the time of the hearing and it is unnecessary to prejudge that outcome. *See*, *Bell v. State*, 996 S.W.2d 739 (Mo. App. S.D. 1999) (applying amended versions of probation statutes). However, if Defendant is correct that subsequent amendments have constrained the trial court's options to a 120-program followed by release, she can hardly claim prejudice as the result of her successful stall into a more favorable outcome.

I.Defendant is not entitled to equitable relief because her claim is barred by the doctrine of laches.

Finally, Defendant is not entitled to equitable relief where she delayed filing this claim for a period of years[10] in a conscious attempt to "run out the clock" on her probation and then cry "foul" to evade her obligations; such a claim is barred under the doctrine of laches. *See*, *State v. Larson*, 79 S.W.3d 891, 895 n.10 (Mo. banc 2002) (reserving ruling on whether motion to withdraw guilty plea might have been denied based on laches).

Here, Defendant pleaded guilty to a crime, accepted the benefits of remaining free despite having failed to comply with the conditions of her probation, and now seeks to benefit from her misconduct by "running out the clock." Such a ploy should not be rewarded.

In *Weber v. Mosley*, 242 S.W.2d 273, 280 (Mo. App. St. L. D. 1951), the Court found it "highly material" that defendant himself "effected the postponement of the fatal day when he would have to pay the penalty exacted by the law for his offense. In so doing he waived his right to insist that time is of

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[10] Defendant's probation revocation hearing was originally scheduled for a hearing on September 4, 2008. Appendix at A27. Defendant contends her probation expired on that date. She was represented by counsel at the time and yet filed nothing raising this issue until January 9, 2013. Appendix at A33.

the essence in the commencement of his term of imprisonment." As held in *Weber*, "if the prisoner acquiesces in or requests the delay in the execution of the commitment he cannot later complain if he is called upon to satisfy the debt. He cannot profit by or take advantage of a delay to which he has assented or which he himself has procured. . . . He will not be allowed to assume contradictory positions to his own advantage." *Id*. at 279-280. *See also*, *State ex rel. McKee v. Riley*, 240 S.W.3d at 729 (although a defendant has no duty to bring himself to trial, failure to assert the right will make it difficult for a defendant to prove that he was denied a speedy trial); *Jennings v. Director of Revenue*, 9 S.W.3d 699, 700 (Mo. App. S.D. 1999) (defendant could not complain of delayed loss of driving privileges where defendant permitted to drive in the interim for significant period of time when he should not have been).

In the case at bar, Defendant candidly admits that she did not desire to proceed with the probation revocation hearing because it would likely result in Defendant being sentenced to the Department of Corrections for a felony. Relator's Brief at 9-10. Defendant seeks to avoid the consequence of a delay she was consciously complicit in and admits she relied upon to further her own purposes; ultimately, she now seeks to use her conscious strategy to avoid the legal obligations she assumed, and to thereby thwart justice. Defendant admits she had knowledge of the facts giving rise to her alleged rights and delayed assertion of them for what she now claims was an excessive time.

Moreover, Defendant now seeks to claim the other party, the State, has lost its legal ability to enforce the terms of her plea; if so, the State has suffered legal detriment. *See*, *Port Perry Marketing Corp. v. Jenneman*, 982 S.W.2d 789, 792 (Mo. App. E.D. 1998) (laches may be invoked when a party with knowledge of the facts giving rise to his rights delays assertion of them for an excessive time, and the other party suffers legal detriment therefrom); *Jennings v. Director of Revenue*, 9 S.W.3d at 700 (if laches applies, party attempting to exercise her rights is barred from doing so).

Because Defendant was neither ready nor willing to proceed with a revocation hearing earlier, the only unreasonable delay was occasioned by Defendant (who neither paid her obligation nor asserted her rights in timely fashion) and the only prejudice suffered was to the State (if the defense theory that it thereby lost statutory authority or power to enforce the benefit of its bargain is valid), the writ should be denied on equitable grounds under the doctrine of laches.

CONCLUSION

The writ of prohibition should be denied, the preliminary order vacated, and the Petition dismissed. Defendant cannot claim unreasonable delay or prejudice where, by her own admission, she did not take advantage of her opportunity for an earlier hearing because she knew it would likely result in a finding of a probation violation and a prison sentence.

The writ of mandamus should be denied because Defendant is not entitled to discharge, and the circuit court has jurisdiction to sentence Defendant in this pending case where no sentence has yet been imposed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify:

1. That the attached brief complies with the limitations contained in Supreme Court Rule 84.06(b) and contains 6,170 words, excluding the cover and certification, as determined by Microsoft Word 2007 software; and

2. That a copy of this notification was sent through the eFiling system on this 25th day of July, 2013, to:

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